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Nos. 01-950 and 01-1018

In the Supreme Court of the United States

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS, PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND D. KUIPER DAIRY, PETITIONERS

v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether 7 U.S.C. 7254 exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

2. Whether the individual petitioners' claim under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, is foreclosed because California's milk pricing and pooling regulations do not discriminate on their face based on state citizenship or residence.

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INTEREST OF THE UNITED STATES

These consolidated cases concern the construction of a provision of an Act of Congress, 7 U.S.C. 7254, that the court of appeals held to exempt California's regulations governing the pricing and pooling of raw milk from scrutiny under the Commerce Clause. The United States has a significant interest in assuring that such provisions are not construed more expansively than was intended by Congress, and in a manner that could burden interstate commerce. At the

Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of the cases.

STATEMENT

This case concerns whether 7 U.S.C. 7254, which saves from preemption certain California laws regarding the composition and labeling of "fluid" (*i.e.*, processed) milk, exempts the State's entire program regulating the market in "raw" (*i.e.*, unprocessed) milk from Commerce Clause scrutiny. The case also concerns whether California's milk regulations, even if exempt from scrutiny under the Commerce Clause, nonetheless violate the Privileges and Immunities Clause in Article IV of the Constitution. Those questions arise against the backdrop of a complex regulatory regime.

1. The United States, like the State of California, regulates the marketing of raw milk in order to stabilize prices and assure adequate supply. The need to regulate milk marketing derives from two distinct phenomena: (1) a pricing structure that permits different returns for raw milk of the same quality depending upon its end use (*e.g.*, as fluid milk, as powdered milk, or as an ingredient in products such as butter and cheese), and (2) a cyclical production process with fairly stable demand, which requires farmers to maintain sufficiently large herds to meet the demand for fluid milk even in periods of lean production. See *Zuber* v. *Allen*, 396 U.S. 168, 172-173 (1969). Those two features led to "utter chaos" when the market was unregulated. *Id.* at 174. In an effort to "restore order to the market and boost the purchasing power of farmers," *ibid.*, Congress enacted the Agricultural Adjustment Act, ch. 25, 48 Stat. 31, which later formed the basis for the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 607 *et seq.*

The AMAA authorizes the Secretary of Agriculture to "establish and maintain such orderly marketing conditions * * * as will establish, as the price to farmers, parity

prices." 7 U.S.C. 602(1). It accordingly empowers the Secretary to issue "marketing orders" that regulate minimum prices that dairy farmers may receive in a defined geographic area. The orders classify milk according to its end use, establish a minimum price for each class of milk, and require regulated distributors to account to a regional pool for each class of milk that they purchase. The regional pools assure dairy farms a uniform "blend price" for each unit of milk sold based on a weighted average value of all milk sold within the marketing area. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 189 n.1 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 342-343 (1984).

2. Not every geographic area in the United States is covered by a federal marketing order. See 7 C.F.R. Pts. 1000-1199; *Block*, 467 U.S. at 342. The California dairy industry has never participated in such an order. Instead, the State has adopted its own regulatory program to stabilize the market for raw milk. California dairy farms are guaranteed a uniform minimum return for their raw milk, regardless of the end use to which the raw milk is to be put by a processor (handler). At the same time, California handlers are required to make different total outlays for raw milk depending upon its end use, which reflects the higher value of raw milk used to produce fluid milk over raw milk used to produce other products. A pooling mechanism reconciles the varying minimum amounts that handlers are required to pay for raw milk with the uniform minimum amounts that California dairy farms are guaranteed to receive for raw milk.

a. To accomplish those regulatory goals, California assigns raw milk to one of five classes depending upon its end use. Cal. Food & Agric. Code §§ 61932-61935 (West 2001). Class 1, which consists of raw milk used to produce fluid milk products, typically demands the highest price. Other classes, such as raw milk used to produce butter (Class 4a) and

cheese (Class 4b), typically demand lower prices. The California Department of Food and Agriculture (CDFA) establishes a minimum price for each component of raw milk (butterfat, solids-not-fat, and fluid carrier) depending on the class of product into which the raw milk is to be processed. A handler that purchases raw milk for processing into fluid milk is obligated to pay at least the Class 1 price, while a handler that purchases raw milk for processing into cheese is obligated to pay at least the Class 4b price.

The price that a handler pays for raw milk—which, as explained above, is based on its end use—does not necessarily equal the price that a dairy farm receives for raw milk. All California dairy farms are guaranteed a uniform minimum price for their raw milk regardless of how the milk is used by the handler that buys it. Otherwise, because handlers that produce fluid milk can pay higher prices for raw milk than can handlers that produce other milk products (because fluid milk commands higher retail prices than other milk products), dairy farms would have an incentive to compete to sell their raw milk to handlers that produce fluid milk. Such competition was thought to result in the inefficient movement of milk around the State. Pet. App. A3, A14 n.3 in *Hillside Dairy Inc.* v. *Lyons* (No. 01-950) (Pet. App.).

The uniform minimum price guaranteed to California dairy farms is a blend price, which CDFA computes based on a weighted average of all raw milk purchases in the State. It thus falls somewhere between the Class 1 price and the Class 4 price. See Pet. App. A3. In fact, CDFA computes two such blend prices—the "quota" price and the "overbase" price. See CDFA, Milk Pooling Branch, *Pooling Plan for Market Milk As Amended* §§ 902-904 (Sept. 1, 2001) <http://www.cdfa.ca.gov> (*Pooling Plan*). The quota price, which is the higher of the two, is paid for an amount of production that was originally determined for California dairy farms based on their respective shares in the 1960s of

the market for raw milk used to produce fluid milk and that has been subject to certain adjustments in subsequent years. See Cal. Food & Agric. Code § 62707 (West 2001); Pet. App. A3-A4. The "overbase" price is paid for a California dairy farm's milk in excess of any quota.[1]

The pooling mechanism among handlers, which results in a transfer of funds from handlers of raw milk for higher-priced uses (*e.g.*, fluid milk) to handlers of raw milk for lower-priced uses (*e.g.*, butter and cheese), reconciles the uniform price guaranteed to California dairy farms with the different prices paid by handlers depending upon the uses that they make of raw milk. In order to determine each handler's obligation to the pool, CDFA calculates an "in-plant blend price" for each handler, which is based on the particular use or uses that the handler makes of the raw milk that it purchases. See *Pooling Plan* Art. 9. (The in-plant blend price must be distinguished from the "quota" and "overbase" blend prices, which are uniform prices paid to California dairy farms and are based on usage of raw milk by *all* handlers, rather than by a single handler.) The handler's in-plant blend price is then multiplied by the total amount of raw milk that the handler has purchased to determine the handler's "gross pool obligation." The handler must account to the pool based on that amount, subject to certain adjustments. If the total amount of a handler's payments to dairy farms is less than its pool obligation (as is typically the case for handlers that primarily produce Class 1 fluid milk because their in-plant blend price ordinarily exceeds the "quota" and "overbase" prices guaranteed to dairy farms), the handler pays the difference into the pool. *Id.* § 1003. If the total amount of a

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[1] California dairy farms may buy and sell quota. See Pet. App. A4. Out-of-state dairy farms are not permitted to own quota because quota is available only to a "[p]roducer," which is defined as "any person that produces market milk in the State of California from five or more cows." *Pooling Plan* § 104 (Pet. App. A79).

handler's payments to dairy farms exceeds its pool obligation (as is typically the case for handlers that primarily produce butter or cheese because their in-plant blend price ordinarily is lower than the "quota" and "overbase" prices), the handler draws on the pool to recover the difference. *Id.* § 1004; see Pet. App. A3-A5.

b. Before the 1997 amendments to the California plan, if a handler bought milk from an out-of-state dairy farm, the handler received a credit against its pool obligation based on its in-plant blend price. Pet. App. A17. As a consequence, although a handler that principally produced fluid milk had to pay money into the pool for its raw milk purchases from California dairy farms, it did not have to pay money into the pool for its purchases from out-of-state farms.

In 1997, the California plan was amended so that the credit that a handler receives for out-of-state milk purchases is equal to the lower of the handler's in-plant blend price or the quota price. See *Pooling Plan* § 900(d); Pet. App. A4-A5. As noted, for a handler that principally produces fluid milk, the quota price is ordinarily lower than its in-plant blend price. As a result, a handler that purchases raw milk from an out-of-state dairy farm to be processed into fluid milk typically must contribute some additional amount to the pool for those purchases. The 1997 amendment thus reduced an incentive that previously existed for handlers that produce fluid milk to purchase raw milk from dairy farms outside California. At the same time, however, out-of-state dairy farms, unlike California dairy farms, are not guaranteed any minimum price (much less the quota price) for their raw milk.

c. California also sets compositional standards for fluid milk sold in the State. Those standards, which exceed the standards set by the federal Food and Drug Administration, establish minimum levels of solids-not-fat and butterfat. See Cal. Food & Agric. Code § 35784 (West 2001). California

handlers standardize their fluid milk by adding a fortifying agent, and they are provided with a fortification allowance that reduces the cost of doing so. *Pooling Plan* § 803(k). Out-of-state handlers are not eligible to receive that fortification allowance. See Pet. App. A25-A26.

3. In the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888, Congress required the consolidation and reformation of federal milk marketing orders. See 7 U.S.C. 7253. Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2).

In addition, Congress included in the FAIR Act the provision at issue in this case, 7 U.S.C. 7254, which states:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

4. a. In consolidated actions, petitioners, which operate dairy farms in Nevada and Arizona, challenged the constitutionality of the 1997 amendments to the California milk pricing and pooling plan. They contended, among other things, that the amended plan discriminates against out-of-state dairy farms in violation of the Commerce Clause and the Privileges and Immunities Clause.

a. The district court rejected those claims. Pet. App. A13, A16-A22. The court granted summary judgment for

the State on the Commerce Clause claim. The court relied on *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999), which the court understood to have held that 7 U.S.C. 7254 "immunized California's milk pricing and pooling laws from Commerce Clause challenge." Pet. App. A19. The court dismissed petitioners' claim under the Privileges and Immunities Clause on the ground that the pooling plan does not discriminate based on out-of-state residency or citizenship. *Id.* at A13.

b. The United States Court of Appeals for the Ninth Circuit affirmed. Pet. App. A1-A15.

The court of appeals, like the district court, held that *Shamrock* controlled the Commerce Clause claim. Pet. App. A6-A6. Although *Shamrock* had addressed California's fortification requirement for fluid milk and its fortification allowance for in-state handlers, not its pricing and pooling requirements for raw milk, the court held that "*Shamrock* broadly refers to the pricing and pooling laws and finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges." *Id.* at A7-A8. The court also viewed the legislative history of 7 U.S.C. 7254 as "demonstrat[ing] that California's pricing and pooling laws were considered to be an important element of California's milk regulatory scheme and necessary to maintain the 'standards of content and purity' for milk." Pet. App. A8 (quoting *Shamrock*, 146 F.3d at 1182). On this basis, the court held that California's raw-milk and fluid-milk regulations are "closely related" and that it "follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk." *Id.* at A10.

The court of appeals also affirmed the district court's dismissal of petitioners' claim under the Privileges and Immunities Clause. The court noted that the corporate petitioners could not state such a claim, because the Privileges and Immunities Clause does not protect corporations. Pet. App.

A13. The court then held that the individual petitioners' claim failed because "the classifications the pooling plan amendments create are based on the location where milk is produced," not on "any individual's residency or citizenship." *Id.* at A14.

SUMMARY OF ARGUMENT

I. Congress did not, in 7 U.S.C. 7254, exempt all of California's milk pricing and pooling regulations from the limitations imposed by the Commerce Clause. This Court has repeatedly instructed that such exemptions must be unmistakably clear. There is no indication in the text or legislative history of Section 7254 that Congress intended to immunize any of California's milk regulations from challenge under the Commerce Clause. Moreover, even if Section 7254's reference to "any other provision of law" were understood to encompass the Commerce Clause, Section 7254 would provide an immunity only for the State's regulations governing the composition and labeling of processed fluid milk sold at retail, not for its separate regulations governing the pricing and pooling of raw milk. The lower courts, having erroneously disposed of the Commerce Clause claim based on Section 7254, did not consider the merits of that claim. Accordingly, the Court should remand the case so that the lower courts may consider, in the first instance, whether the California regulations impermissibly discriminate against interstate commerce.

II. California's milk pricing and pooling regulations, unlike most of the state laws that this Court has considered under the Privileges and Immunities Clause, do not discriminate on their face based on state citizenship or residency. The Clause does not, as the court of appeals may have presumed, prohibit only such facially discriminatory laws. The Court in *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), invalidated a state law that did not on its face discriminate based on state citizenship or residency, but drew

distinctions that effectively served as a proxy for state citizenship or residency. The Court's recent decisions have not addressed whether a state law, in order to violate the Clause, must have the purpose, as well as the effect, of discriminating because of state citizenship or residency. That analysis might be informed by the Court's analysis of state laws challenged under the Equal Protection Clause, which also protects individuals against discriminatory action by state governments, and which is violated only when such action is discriminatory in both purpose and effect.

The Court could appropriately avoid addressing any unsettled questions presented by the privileges and immunities claim in this case. If the Court holds that Section 7254 does not provide a Commerce Clause immunity for the regulations at issue here, the lower courts will have to consider the merits of petitioners' Commerce Clause challenge to those regulations, because only the individual petitioners are also asserting a challenge under the Privileges and Immunities Clause. And, if petitioners ultimately prevail under the Commerce Clause, it may be unnecessary ever to reach their claim under the Privileges and Immunities Clause.

ARGUMENT

I. CONGRESS HAS NOT EXEMPTED ALL OF CALIFORNIA'S MILK PRICING AND POOLING REGULATIONS FROM SCRUTINY UNDER THE COMMERCE CLAUSE

Although the Commerce Clause "limits the power of the States to erect barriers against interstate trade," "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine* v. *Taylor*, 477 U.S. 131, 137, 138 (1986). The Court has held, however, that Congress must make any such authorization "unmistakably clear" so as to assure that "all segments of the country are represented" in a decision to allow one State to

affect persons or operations in other States. *South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91, 92 (1984). "[A] rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *Id.* at 92; accord, *e.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve * * * a violation of the Commerce Clause."); *Taylor*, 477 U.S. at 139 ("An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation.").

Section 7254 does not contain any indication at all, much less an "unmistakably clear" one, that Congress intended to immunize the regulations at issue here from Commerce Clause scrutiny. The statutory text does not include any reference either to the Commerce Clause or to California's pricing and pooling laws for raw milk. Nor does the legislative history provide any indication that Congress intended Section 7254 to immunize those laws from scrutiny under the Commerce Clause.

A. Section 7254 Contains No "Unmistakably Clear" Expression Of Congressional Intent To Immunize Any State Law From The Commerce Clause

Section 7254 states that "[n]othing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California" to enact or enforce certain of its own laws. That statutory text does not unambiguously express an intent by Congress to exempt *any* of California's laws from the Commerce Clause. Section 7254 does not even refer to the Commerce Clause specifically, or to the Constitution more generally.

Congress has elsewhere spoken with considerably greater clarity in expressing its intent to immunize state laws from

the implied limitations of the Commerce Clause.[2] More generally, when Congress has sought to refer to the Constitution as well as to other sources of law, Congress has often (although not always) made specific reference to the Constitution.[3]

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[2] See, *e.g.*, 26 U.S.C. 3305(a) ("No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce."); 15 U.S.C. 1011 (McCarran-Ferguson Act) ("[S]ilence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the] business [of insurance] by the several States."); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946) (describing McCarran-Ferguson as "expressly stat[ing]" Congress's intent to permit certain state regulation and taxation of insurance that the Commerce Clause would otherwise prohibit).

[3] See, *e.g.*, 18 U.S.C. 241 (prohibiting conspiracy to interfere with rights under "the Constitution or laws of the United States"); 18 U.S.C. 242 (prohibiting action under color of law in deprivation of rights protected by "the Constitution or laws of the United States"); 28 U.S.C. 453 (judicial oath to perform faithfully and impartially all duties "under the Constitution and laws of the United States"); 28 U.S.C. 1331 (district court jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States"); 28 U.S.C. 2241(c)(3) (authority to grant writ of habeas corpus to persons "in custody in violation of the Constitution or laws or treaties of the United States"); 33 U.S.C. 1518(a)(1) (applying "[t]he Constitution, laws, and treaties of the United States" to licensed deepwater ports); 42 U.S.C. 1983 (providing civil cause of action for deprivation of rights "secured by the Constitution and laws"); 43 U.S.C. 1333(a)(1) (extending "[t]he Constitution and laws" of the United States to areas of the outer Continental Shelf). Cf. U.S. Const. Art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."); *id.* Art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

Moreover, Congress's directive in Section 7254 that no provision of law "shall be construed" in a particular manner is more naturally read as referring only to non-constitutional sources of federal law, *i.e.*, Acts of Congress or agency regulations implementing them. Congress is not ordinarily assumed to have intended to constrain the Judiciary's authority to construe the Constitution. Cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997) ("[T]he Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.") (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Thus, if Congress sought to exercise its power under the Commerce Clause to authorize state laws that would otherwise be invalid under that Clause, Congress could reasonably be expected to do so in a straightforward manner by declaring the state laws valid, not to presume to instruct the courts (including this Court) to alter their construction of the Constitution.

Furthermore, if the reference in Section 7254 to "any other provision of law" were read to include the Constitution, it would presumably include provisions of the Constitution beyond the Commerce Clause—such as the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment, both of which petitioners also invoked in this case. Congress would have been aware, however, that it cannot, when exercising its authority under the Commerce Clause, immunize state laws from scrutiny under other provisions of the Constitution. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 507 & n.21 (1999); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 883 (1985). Thus, if Congress had intended to provide the California regulations with immunity under the Commerce Clause,

Congress could be expected to have referred more specifically to that Clause.

Nor is there any reason to suppose that Congress intended to authorize California, and only California, to erect barriers to interstate commerce that would otherwise be forbidden by the Commerce Clause. Section 7254 reaches not only California laws in existence at the time of its enactment, but also California laws that might come into existence at some later time. It is particularly unlikely that Congress would have created so open-ended an immunity from the Commerce Clause for whatever laws California might choose to adopt in the future to regulate the marketing of raw or processed milk.

In sum, Section 7254 does not establish, with the requisite degree of clarity, any Commerce Clause immunity for any California law. Rather, Section 7254 is properly understood as protecting certain California laws against preemption only by "this Act" (*i.e.*, the FAIR Act) and other provisions of federal statutory or regulatory law.

B. Section 7254 Does Not Encompass California's Regulations Governing The Pricing And Pooling Of Raw Milk

Section 7254, even if construed to provide a Commerce Clause immunity for some state laws, does not reach the laws at issue here. Neither the text of Section 7254 nor the context in which it was enacted provides any manifestation of congressional intent to protect California's milk pricing and pooling regulations.

1. Section 7254, by its terms, applies only to laws regarding "the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California" and "the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U.S.C. 7254(1) and (2). The pricing and pooling laws do not regulate, directly or indirectly, fluid-milk content or fluid-milk labeling. They are

thus outside the scope of whatever Commerce Clause exemption Section 7254 even arguably provides.[4]

Congress's decision to confine Section 7254 to a subset of California's milk marketing laws appears to have been quite deliberate. Other provisions of the FAIR Act, of which Section 7254 was a part, demonstrate that, when Congress wanted to refer to California's milk pricing and pooling laws, Congress did so more specifically. In the immediately preceding section of the FAIR Act, Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2). Congress further provided that any such "order covering California shall have the right to reblend and distribute order receipts to recognize quota value," *ibid.*, thus referring specifically to the aspect of California's pricing and pooling laws that guarantees state dairy farms with "quota" a higher blend price for their raw milk. See pp. 4-5, *supra*. Presumably, if Congress had wanted Section 7254 to encompass California's pricing and pooling laws, Congress would have referred to those laws with similar specificity.

The court of appeals acknowledged in its predecessor *Shamrock* decision that Section 7254 "does not specifically refer to these [pricing and pooling] laws, as it does to the milk composition standards." 146 F.3d at 1182 (Pet. App. A34). In both this case and *Shamrock*, however, the court concluded that Section 7254 encompasses the pricing and pooling laws as well, reasoning that those laws and the com-

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[4] As noted above (at 3-4), CDFA establishes minimum prices that handlers must pay for various components of raw milk—butterfat, solids-not-fat, and fluid carrier. Even if a regulation that provides for setting a price for the "milk solids" or "solids-not-fat" component of milk could be viewed as a regulation "regarding * * * the percentage of milk solids or solids not fat" in milk, Section 7254 refers to the percentage of those components in "fluid milk," not raw milk.

position and labeling laws are "interrelated and mutually interdependent." Pet. App. A7 (quoting *Shamrock*, 146 F.3d at 1182). The court was mistaken. Even if Congress's express exemption of one state law from the Commerce Clause were understood to extend to "interrelated and mutually interdependent" state laws, no such relationship exists between the fluid-milk composition and labeling laws expressly referred to in Section 7254 and the raw-milk pricing and pooling laws at issue here.

The pricing and pooling laws are not part of the same regulatory program as the composition and labeling laws. The programs are authorized under different divisions of the California Food and Agriculture Code. Compare Cal. Food & Agric. Code § 35784 (West 2001) (composition standards), with *id.* §§ 62061 *et seq.* (minimum prices) and *id.* §§ 62700 *et seq.* (equalization pools). The programs were implemented at different times. And they are administered by different components of the CDFA. See CDFA, *Welcome to California Dairy Programs* (visited Sept. 16, 2002) <http://www.cdfa.ca.gov/dairy> (noting that the milk composition laws are administered by the Milk and Dairy Foods Control Branch, while the milk pricing and pooling laws are administered by the Dairy Marketing Branch and the Milk Pooling Branch). It would be particularly unwarranted in such circumstances to construe Congress's express reference to California's composition and labeling laws for fluid milk as also encompassing California's pricing and pooling laws for raw milk.

2. The context in which Section 7254 was enacted supports the conclusion that it was intended solely to protect California's fluid-milk composition and labeling laws against preemption by federal statutes and regulations. In 1990, Congress enacted the Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-533, 104 Stat. 2362, which prohibits States from setting standards of identity for a food

that are different from the standards set by the FDA. See 21 U.S.C. 343-1(a). In response, out-of-state dairy farms, which had previously complied with the California composition and labeling standards when marketing milk in the State, sought a judicial determination that the NLEA preempted those California standards. The State, in turn, petitioned the FDA for an exemption from the NLEA for its milk composition and labeling standards. See *Shamrock*, 146 F.3d at 1180 (Pet. App. A28).

At the congressional hearings on what was to become the FAIR Act, witnesses asked Congress specifically to exempt the California milk composition and labeling standards from preemption by the NLEA or other federal statutes. For example, Representative Bill Thomas, the only Member of Congress to testify concerning California's milk regulations, urged that those standards be protected against preemption by "national nutritional labeling requirements." *Formulation of the 1995 Farm Bill (Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agric.*, 104th Cong., 1st Sess. 435 (1995) (*House Hearings*). He did not urge that any of California's other milk regulations, including those governing the pricing and pooling of raw milk, be protected against federal statutory or constitutional challenge. Other witnesses similarly focused on the need to assure that California could continue to enforce its fluid-milk composition standards.[5]

The Conference Report on the FAIR Act confirms that Section 7254 was directed only at the particular problem identified at the congressional hearings. See H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 338 (1996). The Conference Report explains that Section 7254 "provides the State

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[5] See, *e.g.*, *House Hearings* 517-518 (prepared statement of A.J. Yates, Deputy Secretary, CDFA); *id.* at 547-548 (prepared statement of James E. Tillison, Alliance of Western Milk Producers); *id.* at 568 (prepared statement of Craig S. Alexander, Dairy Institute of California).

of California an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk," so that California may "fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State." *Id.* at 338-339. The Conference Report further states that, for these purposes, "fluid milk" means "milk in final packaged form for beverage use." *Id.* at 339. This specific focus refutes the notion that Congress intended to grant a broad Commerce Clause immunity for California laws governing the pricing and pooling of *raw* milk.

The court of appeals, in adopting its more expansive interpretation of Section 7254, did not discuss the Conference Report, which is usually the most authoritative legislative history of an Act of Congress. The court nonetheless purported to find "ample support" in the legislative history—specifically, the testimony of two witnesses at the congressional hearings—for the proposition that "Congress intended that the milk pricing and pooling scheme be included in the exemption." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34); accord Pet. App. A8. Ordinarily, the testimony of two witnesses, only one of whom was a Member of Congress, is an uncertain indication of what Congress as a whole intended. See *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) (noting, when a State sought to sustain its claim of a Commerce Clause exemption based on a single statement on the House floor, that "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards"). Here, moreover, the witnesses' testimony offers no support for the court's interpretation of Section 7254.

For example, Representative Thomas did not, as the court of appeals perceived, "explain[] that the success of California's milk standards is attributable to the state's pricing system." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34). In-

stead, Representative Thomas stated that the success of the California dairy industry was attributable both to the State's "standards for fluid milk products which ensure a high quality product" and to the State's "pricing system for dairy products." *House Hearings* 435. He did not suggest that the composition regulations and the pricing regulations were dependent on each other for their effectiveness. Moreover, even if Representative Thomas had made the statement that the court attributed to him, the statement still would say nothing about any Commerce Clause exemption for the pricing and pooling laws.[6]

In sum, Section 7254 provides no indication that Congress intended to exempt California's pricing and pooling regulations from the Commerce Clause, much less the "unmistakably clear" expression of congressional intent that this Court's decisions require. *South-Cent. Timber*, 467 U.S. at 91. The court of appeals erred in concluding otherwise. Because both the court of appeals and the district court held Section 7254 foreclosed petitioners' Commerce Clause challenge, those courts did not address the underlying merits of that challenge. Nor do petitioners ask this Court to do so in the first instance. In these circumstances, the Court should reverse the court of appeals' judgment insofar as it holds that Section 7254 bars petitioners' Commerce Clause claim and remand the case for consideration of that claim on the merits.

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[6] Similarly, Craig S. Alexander of the Dairy Institute of California, whose testimony was also cited by the court of appeals (see *Shamrock*, 146 F.3d at 1182), discussed the State's milk composition regulations separately from other aspects of its milk marketing program. See *House Hearings* 480-482. He urged "[f]ederal legislation * * * to preserve Ca[illegible]rnia's standards" for the composition of fluid milk products, *id.* at 482, but did not urge legislation to protect the pricing and pooling laws against a federal constitutional or statutory challenge.

II. THE CALIFORNIA REGULATIONS ARE SUBJECT TO SCRUTINY UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE EVEN THOUGH THEY DO NOT FACIALLY DISCRIMINATE ON THE BASIS OF STATE CITIZENSHIP OR RESIDENCY

Petitioners argued below that the 1997 amendments to California's milk pricing and pooling plan also violate the Privileges and Immunities Clause in Article IV of the Constitution. As relevant here, the court of appeals rejected that claim on the ground that "the classifications the pooling plan amendments create are based on the location where milk is produced," and "do not, on their face, create classifications based on any individual's residency or citizenship." Pet. App. A14. To the extent that the court of appeals' ruling rested on the fact that the California regulations do not facially discriminate against citizens or residents of other States, that ruling is incorrect. Under this Court's decision in *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522, 526-527 (1919), a state law is not exempt from the restrictions imposed by the Privileges and Immunities Clause merely because it does not create distinctions explicitly based on state citizenship or residency. Accordingly, the Court should reverse or vacate the judgment of the court of appeals with respect to the Privileges and Immunities Clause claim and remand for further consideration of that claim to the extent warranted in light of the disposition of petitioners' Commerce Clause claim.

1. The Privileges and Immunities Clause of Article IV provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV, § 2. The Clause thereby "place[s] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."

Lunding v. *New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quoting *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868)). The Clause applies only to natural persons. See *Western & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 656 (1981). Accordingly, as the court of appeals recognized (Pet. App. A13), only the individual petitioners may assert a claim under the Clause. Petitioners do not contend otherwise.

"[O]ne of the privileges which the [Privileges and Immunities] Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 280 (1985) (quoting *Toomer* v. *Witsell*, 334 U.S. 385, 396 (1948)). The Clause thus is among the provisions of the Constitution "intended to create a national economic union." *Piper*, 470 U.S. at 280. The Clause, like the Commerce Clause (and certain other constitutional provisions), derived from Article IV of the Articles of Confederation, which stated:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States * * * shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Austin v. *New Hampshire*, 420 U.S. 656, 660 (1975); see *Hicklin* v. *Orbeck*, 437 U.S. 518, 531-532 (1978) (noting "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and

their shared vision of federalism"). As this Court has recognized, however, the Privileges and Immunities Clause and the Commerce Clause, while addressing closely related concerns, "have different aims and set different standards for state conduct." *United Bldg. & Constr. Trades Council* v. *Mayor of Camden*, 465 U.S. 208, 220 (1984).

The Court has held that, even with respect to state laws that explicitly distinguish between a State's own citizens and citizens of other States, "the privileges and immunities clause is not an absolute." *Toomer*, 334 U.S. at 396. For example, no violation will be found if a State's program of regulation or taxation, considered as a whole, provides a "reasonably fair distribution of burdens" between citizens and non-citizens of the State, at least where "no intentional discrimination has been made against non-residents," *Travellers' Ins. Co.* v. *Connecticut*, 185 U.S. 364, 371 (1902), or where there is "substantial equality of treatment" for citizens and non-citizens, *Lunding*, 522 U.S. at 297. See *Shaffer* v. *Carter*, 252 U.S. 37, 55 (1920). Moreover, "when confronted with a challenge under the Privileges and Immunities Clause to a law distinguishing between residents and nonresidents, a State may defend its position by demonstrating that '(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Lunding*, 522 U.S. at 298 (quoting *Piper*, 470 U.S. at 284).

2. All of the state laws that the Court has invalidated under the Privileges and Immunities Clause in its recent decisions discriminated on their face based on state citizenship or residency. See, *e.g.*, *Lunding*, 522 U.S. at 291-292 (state tax law governing treatment of nonresidents' alimony payments); *Supreme Court of Va.* v. *Friedman*, 487 U.S. 59, 62 (1988) (state rule that only state residents could be admitted to state bar without examination); *Piper*, 470 U.S. at 277 n.1

(state rule that only state residents could be admitted to state bar); *Hicklin*, 437 U.S. at 521 (employment preference for state residents); *Austin*, 420 U.S. at 658 n.1 (state tax on "every taxable nonresident" on "New Hampshire derived income"); *Toomer*, 334 U.S. at 389-397 (state law imposing higher fishing license fee on out-of-state residents); cf. *Mayor of Camden*, 465 U.S. at 211 (city ordinance requiring that at least 40% of jobs on city construction projects be reserved for city residents, thereby discriminating not only against residents of other States, but also against residents of the same State who resided outside the city).

The California raw-milk pricing and pooling regulations, in contrast, do not draw any distinction on their face between citizens (or residents) of California and citizens (or residents) of other States. The regulations instead treat *milk* differently depending upon whether the *dairy farm* from which it originates is located inside or outside California. See Pet. App. A14.

A state law is not exempt from scrutiny under the Privileges and Immunities Clause, as the court of appeals may have believed, simply because the law does not distinguish, in so many words, between a State's own citizens or residents and those of other States. In *Chalker*, the Court held that the Privileges and Immunities Clause was violated by a state tax statute that on its face drew distinctions based not on citizenship or residency, but on whether persons maintained the "chief office" of their business inside or outside the State. See 249 U.S. at 526-527. The Court accepted the state supreme court's construction of the statute as imposing the higher tax on all persons, including the State's own citizens, who maintained their chief office outside the State. The Court reasoned, however, that because "the chief office of an individual is commonly in the State of which he is a citizen," the statute, as a "practical[]" matter, "would produce discrimination against citizens of other States." *Id.* at 527.

The Court then concluded that there was no adequate basis for taxing individuals based on the location of their chief office; indeed, the Court viewed the classification as "arbitrary and unreasonable." *Ibid.* Having found no sufficient justification for the statutory distinction between citizens and non-citizens, the Court invalidated the statute under the Privileges and Immunities Clause. *Ibid.*

3. It does not follow from *Chalker* that every state law that might have a disparate impact on individuals who are not citizens or residents of the State implicates the Privileges and Immunities Clause, as petitioners at times appear to suggest. See 01-1018 Pet. 20, 22 (arguing that the relevant consideration is "discriminatory effect"). In *Chalker* itself, for example, the state statute on its face *did* draw an in-state/out-of-state distinction—albeit in terms of the location of a person's chief office, rather than citizenship or residency. The Court, in effect, concluded that the location of the chief office served as a proxy for state citizenship because there was a high correlation between the two. The analysis in *Chalker* would not necessarily apply when the state law in question is neutral on its face, containing no provision that operates as a proxy for state citizenship or residency, but nonetheless having a disparate impact on citizens or residents of other States. In this case, however, the California regulations do draw a distinction based on whether the dairy farm where the milk originates is located inside or outside the State. The regulations consequently bear some resemblance in this respect to the statute in *Chalker*, and petitioners note (01-1018 Pet. 18) the high correlation between the location of a dairy farm and the residence of its individual owner or operator.

It nonetheless is not entirely clear what the inquiry under the Privileges and Immunities Clause should be when a state law does not, on its face, draw distinctions based on state citizenship or residency. In *Chalker* itself, the Court sug-

gested that the Clause reaches laws that "*in their practical operation* materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States." 249 U.S. at 556-557 (emphasis added). In the decades since *Chalker*, however, the Court has made clear that the Equal Protection Clause of the Fourteenth Amendment reaches only those state laws that have a discriminatory purpose as well as a discriminatory effect. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Under the Commerce Clause, in contrast, the Court has continued to recognize that in some circumstances a state law may be invalid based on its "practical effect" alone. *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989).

The Court has not had the occasion to consider whether, or to what extent, intervening developments in the Court's approach to evaluating state laws challenged as discriminatory under the Equal Protection Clause should inform its analysis of state laws challenged as discriminatory under the Privileges and Immunities Clause of Article IV. The two Clauses are similar in structure and purpose. Both Clauses explicitly constrain state authority in order to protect persons against discrimination. See, *e.g.*, *Toomer*, 334 U.S. at 395 (characterizing the Privileges and Immunities Clause as a "protection of * * * equality"); *Paul*, 75 U.S. (8 Wall.) at 180 (observing that the Privileges and Immunities Clause, *inter alia*, "inhibits discriminating legislation against [the citizens of each State] by other States," "insures to them in other States the same freedom possessed by the citizens of those States," and "secures to them in other States the equal protection of their laws"); George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscri-*

mination, 73 Iowa L. Rev. 351, 378 (1988) (describing the Privileges and Immunities Clause as "the first 'equal protection' clause in the Constitution," which, "[i]n essence, * * * made distinctions based upon state citizenship inherently suspect"). Indeed, the Equal Protection Clause is coupled in the Fourteenth Amendment with a second Privileges and Immunities Clause, which was modeled after the Clause in Article IV. See *Saenz*, 526 U.S. at 502 n.15.

The Commerce Clause, in contrast, is a structural provision of the Constitution, which is expressly addressed to the powers of Congress, and which only by implication constrains the powers of States. It was not principally designed to protect individual rights, privileges, or immunities. See *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 305, 309, 312 (1992); but cf. *Dennis* v. *Higgins*, 498 U.S. 439, 447 (1991) (persons may bring suit under 42 U.S.C. 1983 to enforce the Commerce Clause). See generally *Mayor of Camden*, 465 U.S. at 220-221 (contrasting Commerce Clause and Privileges and Immunities Clause).

A standard that considered whether a state law has the purpose, as well as the effect, of discriminating based on state citizenship or residency might serve to confine the Privileges and Immunities Clause to its intended function: to remove "from the citizens of each State *the disabilities of alienage* in the other States," *Paul*, 75 U.S. (8 Wall.) at 180 (emphasis added), not all burdens that may incidentally fall more heavily on citizens of other States. Such a focus would also avoid the "far reaching" consequences of a standard that "would raise serious questions about, and perhaps invalidate, a whole range of * * * statutes," *Davis*, 426 U.S. at 248, that do not draw distinctions on their face based on state citizenship or residency, that were not intended to discriminate against citizens or residents of other States, and that would withstand scrutiny under other constitutional provisions (or that have been authorized by Congress under the

Commerce Clause). Cf. *Metropolitan Life Ins.*, 470 U.S. at 899 (O'Connor, J., dissenting) (suggesting, with respect to state economic regulations, that the Court should be reluctant to apply other provisions of the Constitution in a manner that would "foil[] Congress's decision under its commerce powers to 'affirmatively permit [some measure of] parochial favoritism'") (quoting *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983)).[7]

It may be particularly appropriate to inquire into the existence of a discriminatory purpose when, unlike here, a state law does not on its face contain *any* in-state/out-of-state classification that might operate as a proxy for a state citizenship or residency classification. Even where, however, a state law, like the California regulations here, does contain an in-state/out-of-state classification, whether the law was adopted for the purpose of disadvantaging citizens or residents of other States may still be a relevant consideration. Cf. *Travellers' Ins. Co.*, 185 U.S. at 371.[8]

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[7] The state law in *Chalker* might well have been found invalid under a privileges and immunities analysis that focused on discriminatory purpose. As the Court has since explained in the equal protection context, "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (offering as an example that "[a] tax on wearing yarmulkes" could be equated with "a tax on Jews"); see *Davis*, 426 U.S. at 242 (observing that discriminatory purpose may be inferred from discriminatory impact in circumstances where such impact "is very difficult to explain on nonracial grounds"). The classification created by the statute in *Chalker*, which based tax burdens on the location of a person's chief office, might have been regarded as sufficiently suggestive of a purpose to discriminate against citizens of other States.

[8] It is far from clear that petitioners could ultimately establish that a motivating purpose of the California regulations was to place the State's own citizens at an advantage over citizens of other States. Nothing in

4. There is no need at this stage of the case for the Court to resolve these and other unsettled questions that may arise concerning the application of the Privileges and Immunities Clause to California's milk pricing and pooling regulations. In this Court, the individual petitioners have focused their arguments, at least at the petition stage, on whether the Clause may be violated by a law that does not facially discriminate based on state citizenship or residency. See 01-1018 Pet. i, 17-23. It therefore appears that they do not seek to have the Court resolve the merits of their privileges and immunities claim at this time, but instead seek to have the Court make clear that facial discrimination against citizens or residents of other States is not required and remand the claim for further consideration on the merits by the lower courts. That, in the view of the United States, would be an appropriate disposition.

If the Court adopts the construction of 7 U.S.C. 7254 that the United States urges in Point I of this brief, the lower courts will have to consider the merits of the Commerce Clause claim on remand, whatever might be the proper dis-

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those regulations or any other provision of California law prohibits citizens of other States from owning dairy farms in California. And, when citizens of other States *do* own dairy farms in California, the milk produced at those dairy farms is treated identically to milk produced at California dairy farms owned by California citizens. For example, all such dairy farms, regardless of the citizenship of their owners, are equally entitled to receive guaranteed minimum prices for their raw milk from California handlers. And all such dairy farms are equally eligible to acquire "quota." By the same token, all raw milk produced at dairy farms outside California is treated identically, whether the dairy farm is owned by citizens of California or citizens of other States. Indeed, the petitioners in this case include a California corporation and two California partnerships (with some or all California partners), which complain about the impact of the California regulations on raw milk produced at the dairy farms that they operate in Nevada. See Amended Complaint 2-3, *Ponderosa Dairy* v. *Veneman*, No. CV-S-97-1185 GEB JFM (Appellants' C.A. E.R. Tab 5); Br. in Opp. 17-18.

position of the Privileges and Immunities Clause claim. That is so because many of the petitioners, as artificial persons outside the reach of Privileges and Immunities Clause, are no longer pressing a claim under that Clause, and thus would not benefit from any ruling on that claim in favor of those petitioners who are natural persons. If the lower courts on remand conclude that the challenged regulations violate the Commerce Clause, then there may be no need to resolve the application of the Privileges and Immunities Clause. And, in any event, the court of appeals' analysis under the Commerce Clause of whether any differing treatment of raw milk produced outside California is sufficiently justified to be sustained under that Clause, as respondents have suggested (see Br. in Opp. 6-8, 11-12), might inform the analysis under the Privileges and Immunities Clause with respect to such questions as (1) whether the milk pricing and pooling plan, considered as a whole, provides a "reasonably fair distribution of burdens," *Travellers' Ins. Co.*, 185 U.S. at 371, and results in "substantial equality" between citizens and non-citizens of the State, *Lunding*, 522 U.S. at 297, and (2) whether any difference in treatment is justified by a "substantial reason" and "bears a substantial relationship to the State's objective," *id.* at 298. Any further consideration of the individual petitioners' privileges and immunities claim therefore would most appropriately be left to the lower courts in the first instance.

CONCLUSION

The judgment of the court of appeals holding petitioners' claim under the Commerce Clause to be foreclosed by 7 U.S.C. 7254 should be reversed and that claim should be remanded for consideration on the merits. The judgment of the court of appeals with respect to the individual petitioners' claim under the Privileges and Immunities Clause should be reversed or vacated and remanded for further consideration to the extent appropriate.

Respectfully submitted.

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